

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

[2015] NZERA Auckland 82  
5381774

BETWEEN                      BRETT RODNEY LARKIN  
   Applicant  
  
A N D                              NGATI KAHU SOCIAL AND  
   HEALTH SERVICES  
   INCORPORATED  
   Respondent

Member of Authority:      T G Tetitaha  
  
Representatives:              M Tawhara, Counsel for the Applicant  
   D Grindle, Counsel for the Respondent  
  
Submissions received:      13 and 19 March 2015 from applicant,  
   6 and 19 March 2015 from respondent  
  
Investigation Meeting:      19 March 2015 at Kaitaia  
  
Date of Oral  
Determination:                19 March 2015  
  
Date of Written  
Determination:                20 March 2015

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**ORAL DETERMINATION OF THE AUTHORITY**

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- A. Mr Larkin’s personal grievances arising prior to 5 December 2011 including the final warning are dismissed.**
- B. Costs are reserved.**
- C. The personal grievances arising after 5 December 2011 will continue to hearing.**

## **Employment relationship problem**

[1] This is an application by Brett Rodney Larkin alleging unjustified disadvantage regarding a final warning dated 13 May 2011 and bullying behaviour. He also complains of an unjustified dismissal on 21 February 2012.

[2] The hearing today is about a preliminary issue regarding my jurisdiction to hear Mr Larkin's applications.

## **Facts leading to dispute**

[3] The facts giving rise to this application are as follows. On 19 March 2007, Mr Larkin was employed as a child youth coordinator by the respondent. Various actions occurred between 2008 and 2011 including the deduction of wages without consent and the issue of warnings, including a final written warning on or about 13 May 2011.

[4] On 11 August 2011, Mr Larkin wrote to the respondent's CEO raising a personal grievance about the final written warning. Some correspondence between Mr Larkin, his lawyer and the respondent resulted in a mediation held on 5 December 2011.

[5] At the mediation, the parties achieved a settlement. The record of the settlement states, amongst other things, that the parties agreed the final written warning dated 13 May 2011 stands, it was a full and final settlement of all matters to date between the parties arising out of the employment relationship and "*except for enforcement purposes neither of [the parties] may seek to bring those terms before the Authority*". The record of settlement was signed by both parties and a mediator on or about 5 December 2011.

[6] On 12 December 2011, Mr Larkin returned to work following a period of time off due to illness and other issues. Between December 2011 and February 2012, Mr Larkin alleges various bullying behaviour. This bullying behaviour included threats to his employment if he did not return to work; being sent home when he was fit to work; failures to provide sufficient training or counselling upon a return to work as per the respondent's policies; failures to address his grievances; an unsafe working environment; differential treatment, for example the failure to give a Christmas ham

or \$50 voucher as a bonus; failures to acknowledge good work; and the respondent allowing staff to discuss his eventual dismissal.

[7] On 9 February 2012, Mr Larkin wrote to the respondent CEO raising a personal grievance stating he had *“been picked on since I have been back at work”*.

[8] On 16 February Mr Larkin was asked to attend a disciplinary meeting. The disciplinary meeting was held on 21 February 2012 and at its conclusion Mr Larkin was dismissed.

[9] On 9 May 2012, Mr Larkin’s lawyer raised a personal grievance of unjustified disadvantage and dismissal.

[10] The matter is now before me for determination of preliminary issues which have arisen about my jurisdiction.

### **Issues**

[11] The preliminary issues are as follows:

- (a) Does s.149(3) of the Employment Relations Act 2000 (the Act) prevent the Authority from inquiring into Mr Larkin’s personal grievances arising prior to the record of settlement dated 5 December 2011;
- (b) Was the personal grievance of unjustified dismissal and/or disadvantage raised with the employer within 90 days; and
- (c) If not, should leave be granted under ss.114 and 115(a) and/or (b) of the Act?

### **Determination**

[12] Mr Larkin submits that if s.149 prevents the Authority from inquiring into his personal grievances prior to 5 December 2011 that there has been a breach of that settlement agreement. The breach means the record of settlement is no longer enforceable. As a result, the pre-5 December 2011 matters can come before me as part of the factual matrix leading to dismissal.

[13] In respect of the issue of the raising of the grievances within 90 days, it is submitted that all grievances were raised within the 90 day period. In the event those

grievances were not raised within the 90 day period, Mr Larkin submits that there are exceptional circumstances. He relies upon the exceptional circumstances set out in ss.115(a) and (b) of the Act. He further says it is just for leave to be granted to allow him to raise personal grievances out of time because there is no prejudice to the respondent, he has made genuine attempts at all times to raise the grievances and there is merit to his concerns about the final written warning. He also refers to the amount of stress he has experienced as a result of this process.

[14] It is common ground that the personal grievances arising after 5 December 2011 of unjustified disadvantage due to bullying behaviour and the unjustified dismissal were raised within 90 days. It is whether the record of settlement prevents the personal grievances that arose prior to 5 December 2011 from coming before me.

[15] The record of settlement, in my view, resolves all personal grievances that arose prior to 5 December 2011. It is clear as to its terms and no issue has been taken with its compliance with s.149 of the Act. In those circumstances, s.149(3) of the Act applies, namely that *“except for enforcement purposes, no party may seek to bring those terms before the Authority”*. There is no issue of enforcement before me. Section 149(3) prevents the parties re-litigating the personal grievances and the remaining issues do not have to be considered by me as a consequence.

[16] Therefore I make the following orders:

- (a) Mr Larkin’s personal grievances arising prior to 5 December 2011 including the final warning are dismissed.
- (b) Costs are reserved.
- (c) The personal grievances arising after 5 December 2011 will continue to hearing.

### **Next steps**

[17] The parties have agreed that this matter can be set down for a one day hearing in Kaitaia. The following timetabling orders are now made:

- (a) An investigation meeting is set down for **30 April 2015 in Kaitaia starting at 9.30am;**

- (b) Both parties are to file their briefs of evidence by **1 April 2015 at 3pm;**
- (c) A bundle of documents, both indexed and paginated, is to be prepared and filed by the applicant in conjunction with the respondent by **1 April 2015 at 3pm.** The briefs of evidence are to refer to the bundle of documents where relevant;
- (d) Both parties are to file their briefs of evidence in reply by **15 April 2015 at 3pm;**
- (e) Opening submissions are to be filed by both parties by **24 April 2015 at 3pm;**
- (f) An opportunity to give final submissions will be offered at the end of the evidence;
- (g) If time and resources allow an oral determination will be given;
- (h) In terms of witnesses I will require both the applicant and the respondent's chief executive officer, Ms Langford to attend the hearing.

**T G Tetitaha**  
**Member of the Employment Relations Authority**